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November 16, 2005



BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Seventh Floor
Washington, D.C. 20423

**Re: STB Finance Docket No. 34776
National Solid Wastes Management Association, et al. – Petition for
Declaratory Order**

Dear Secretary Williams:

Enclosed please find an original and 15 copies of the Reply of the New Jersey Department of Environmental Protection and New Jersey Meadowlands Commission to Petition of National Solid Wastes Management Association, et al. for Declaratory Order, in the above referenced proceeding. Please date stamp and return one copy to our messenger for our records.

If you have any questions concerning this, please do not hesitate to contact me.

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Office of Proceedings

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Office of
Public Records

Very truly yours,

Edward D. Greenberg

Enclosure

cc: David Konschnik
All Parties

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34776



**REPLY OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL
PROTECTION AND NEW JERSEY MEADOWLANDS COMMISSION TO PETITION
OF NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, ET AL. FOR
DECLARATORY ORDER**

In accordance with 49 C.F.R. § 1104.13, the New Jersey Meadowlands Commission (“NJMC”) and the New Jersey Department of Environmental Protection (“NJDEP”) submit this Reply to the Petition of the National Solid Waste Management Association (“NSWMA”) et al. for declaratory order (“NSWMA petition”) and, for the reasons discussed below, suggest that the Board not initiate such a proceeding at this time.

NJMC and NJDEP are fully supportive of the objectives that the NSWMA petition seeks to achieve. NJMC and NJDEP are aware that uncontrolled solid waste transfer stations that illegitimately seek to cloak themselves in railroad preemption not only cause harm to the public health and the environment, but also harm legitimate companies that are lawfully engaged in waste collection, recycling, and disposal. As the Third Circuit recognized, New Jersey is a “densely populated [S]tate that has suffered the scourge of unregulated solid waste for decades,” and the State has a “compelling” interest in seeing its environmental laws enforced against these rogue operators. Hi Tech Trans, LLC v. New Jersey, 382 F.3d 295, 297 (3rd Cir. 2004) (internal citations omitted).¹ Indeed, one look at the photographs attached as Exhibit B to the NSWMA petition should serve to quickly dispel any doubt about the public health and environmental

¹This enforcement process is frustrated by the fact that as soon as one of these rogue operations is discovered and the State takes legal action against it, that operation shuts down and another pops up to take its place.

problems that the State faces and the type of businesses with which the petitioners have to deal. In enacting the preemptive provisions of the Interstate Commerce Clause Termination Act (“ICCTA”) for legitimate rail carriers engaged in activities integrally related to rail operation, Congress never intended that rogue solid waste operators benefit themselves to the detriment of both the public health and the environment and legitimate competitors.²

For several years, NJDEP has been actively pressing the importance of harmonizing the environmental, health and safety laws with the Congressional directive (embodied in 49 U.S.C. § 10501(b) and comparable preemption provisions) that states and local communities not unduly interfere with bona fide rail carrier transportation activities. As part of that effort, NJDEP met with stakeholders, including rail carriers and solid waste operators, conducted a rulemaking proceeding, and subsequently modified the regulations applicable to solid waste transload operations in order to ensure that such regulations would not pose an undue burden on rail carrier operations. See N.J.A.C. 7:26-2D.1 et seq. (the “Intermodal regulations”).³ Notwithstanding that effort, NJDEP was compelled to litigate with Hi Tech before the Commission, two federal district courts, the Third Circuit, before NJDEP itself in an administrative proceeding, and in a New Jersey state appellate court.

Similarly, the New Jersey Pinelands Commission is involved in comparably extensive litigation in a case called J.P Rail, Inc. v. New Jersey Pinelands Comm’n, No. 05-2755 JBS

²NJDEP and NJMC have obtained comparable photographs of the outrageous conditions at the other four sites that are currently involved in the NYS&W litigation described below and will provide those for the Board at an appropriate time in the event this proceeding continues.

³The Intermodal regulations applicable to rail carrier transload operations, which were finalized in October 2004, substantially mirror the solid waste regulations otherwise applicable to solid waste facilities, as set forth at N.J.A.C. 7:26-2.1 et seq., but notably do not require rail carriers to apply for or obtain permits in advance of constructing or operating such facilities or to pay the substantial licensing fee described in the NWSMA petition (at 9).

(D.N.J.) in which the State contends that a rail carrier is acting as a front for a solid waste operator--with an extensive environmental non-compliance record--that is attempting to come within the protective reach of ICCTA by masquerading as a legitimate rail operation. Worse yet, this solid waste operator wants to build this unregulated transfer station in the fragile and federally protected Pinelands area of the State.

Finally, as NSWMA recites in its petition, both NJDEP and NJMC are actively litigating with NYS&W in New York, Susquehanna & Western Railway Corporation v. Bradley M. Campbell et al., No. 05-4010 (D.N.J.) because 1) NYS&W was not--and is not--in compliance with the Intermodal regulations; 2) contrary to Township of Woodbridge v. Consolidated Rail Corp., STB Docket No. 42053, 2000 WL 1771044 (STB 2000), NYS&W is trying to use section 10501(b) as an excuse to avoid obligations it contractually consented to in a prior settlement agreement, Hackensack Meadowlands Development Commission v. New York Susquehanna & Western Railroad, New Jersey Office of Administrative Law Docket No. HMD 09070-97N (the "Settlement Agreement"); and 3) evidence gleaned during discovery reveals that the shippers and loaders at the five NYS&W sites in question--including the 16th St. site described in the NSWMA petition--may be attempting to disguise what are in effect pure solid waste operations as legitimate rail operations. In other words, in that litigation NJDEP and NJMC are actively pursuing the Hi Tech issues of whether these are transportation activities provided by a rail carrier and whether those activities are integral to rail transportation.

The NYS&W case is actively being litigated in federal district court before Judge Katharine S. Hayden. The litigation was initiated when NJDEP, having been made aware of the deplorable state of solid waste transfer facilities allegedly being operated by NYS&W in North Bergen, initiated an administrative action on July 26, 2005 seeking to penalize NYS&W for its

past violations of the Intermodal regulations and to compel that company to cease and desist from any continued operations at five facilities until such time as it came into compliance.

Rather than comply, NYS&W filed a complaint in the federal court seeking to restrain NJDEP from pursuing its administrative enforcement of the Intermodal regulations, seeking to restrain NJMC from interfering with NYS&W's operations or otherwise attempting to enforce the Settlement Agreement, and seeking a declaration that the Intermodal regulations are preempted and unconstitutional.⁴ In response, NJDEP and NJMC challenged NYS&W contentions, filed a counterclaim for enforcement of the Intermodal regulations and the Settlement Agreement, and added as third-party defendants the ten companies engaged in the solid waste transfer activities being conducted at the five sites.

At the current time, NJDEP and NJMC are, at the instruction of Judge Hayden, actively engaged in taking expedited discovery of NYS&W and the third-party defendants in order to develop information bearing upon the Hi Tech factors at the five facilities. In addition, NJDEP and NJMC are reviewing the current state of operations at the five sites in order to advise the court as to whether those facilities have now been brought substantially into compliance with the Intermodal regulations. Judge Hayden has scheduled further hearings in this matter for December 12 and 13, 2005.⁵

⁴It is worth noting that NYS&W had actively participated in the rulemaking which led to the promulgation of the Intermodal regulations and conceded that the NJDEP had police powers to protect the public health and safety of its citizens and the environment. Remarkably, despite this concession, NYS&W is now contending before Judge Hayden that the preemption in section 10501(b) is absolute, that the entirety of the Intermodal regulations is preempted and unenforceable against rail carriers, and that the rail carrier is answerable to no one for compliance with any environmental or public health and safety statute or regulation. NJDEP and NJMC, of course, disagree with this contention.

⁵NJDEP and NJMC have received copies of filings made with the Board in this docket by Donald Horowitz, counsel for Rail-Tech, LLC and on behalf of the New York Susquehanna and Western Railway Corporation. Those parties argue, *inter alia*, that the NSWMA petition should be

With this background in mind, NJDEP and NJMC believe that there is no reason for the Board to initiate the requested declaratory order proceeding. The Board has already established that not all claimed railroad operations are actually rail transportation within the meaning of 49 U.S.C. § 10102(9) and that not all the activities provided at a given site are integral to rail transportation. STB Finance Docket No. 34192 (Sub-No. 1), Hi Tech Trans, LLC--Petition for Declaratory Order (decision served November 20, 2002; not published). Similarly, the Board has already made clear that the preemption provision of section 10501(b) does not deprive the states or local communities of their essential police powers necessary to protect the environment and public health and safety. See, e.g., STB Finance Docket No. 34020, Fletcher Granite Company, LLC--Petition for Declaratory Order (decision served June 29, 2001; not published). Thus, the Board has already enunciated the fundamental principles which the NSWMA petition seeks to establish.

NJDEP and NJMC believe that all five of the sites being challenged in the action before Judge Hayden are unlawful and that discovery will likely demonstrate that all five run afoul of the Hi Tech decision, in that they are neither being operated by NYS&W nor conducting activities integral to rail transportation. But these are fact intensive cases, and it is the experience of NJDEP and NJMC that the relevant operations at such facilities are invariably different, so that the expedited and thorough discovery available to parties under the Federal Rules of Civil

dismissed as moot because operations of the 16th Street facility, whose operations were specifically challenged, have either been terminated or suspended. Although NJDEP and NJMC believe that the Board should not initiate the requested proceeding, they are compelled to point out that this representation may not be accurate. For example, while NYS&W counsel represented to Judge Hayden on October 24, 2005 that operations of that site had been suspended (see NYS&W Reply to Petition of National Solid Wastes Management Association *et al.* for Declaratory Order, dated November 14, 2005, Exhibit 3 at 46), NJDEP and NJMC have been made aware that operations of that site later resumed for at least some undetermined period of time. It is accordingly not clear that the issues arising at the 16th Street facility are moot.

Procedure, and the injunctive power of the federal courts, is a more appropriate and efficient avenue to resolve actual disputes than is the Board's more limited discovery procedures and authority.

Moreover, a resolution of the status of the 16th Street facility featured in the NSWMA petition will not necessarily be relevant to the other four sites that are the subject of the action pending before Judge Hayden, or of the other purported rail transload sites that spring up almost daily in New Jersey and other states. If the Board entertains this proceeding, it is likely to be confronted with the same burdensome caseload that is already challenging the resources of New Jersey's regulatory agencies since there are many more such cases that will need to be resolved, each on its own peculiar facts.

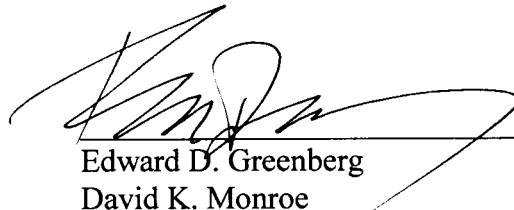
Again, NJDEP and NJMC certainly agree with the sentiments of and the goals sought by the NSWMA petition. Nonetheless, in view of the pending litigation in the NYS&W proceeding in federal court and the fact that the declaratory order sought here would not serve to terminate the controversies at any of the five sites at issue in that case or which may arise elsewhere, the State believes that the Board should stay its hand for the time being and not initiate the requested proceeding. In the event that it does become necessary to seek the Board's expertise, that can be accomplished at an appropriate time.⁶

In the event the Board does elect to initiate such a proceeding, both NJDEP and NJMC would wish to submit substantive comments responsive to the NSWMA petition at an appropriate time. Further, NJDEP and NJMC believe that the record in such a proceeding would

⁶ See STB Docket No. 42094, PCI Transportation, Inc. v. Fort Worth & Western Railroad Company (decision served October 31, 2005; not published), where the Board similarly declined to initiate a declaratory order proceeding despite its clear jurisdiction over the matter because the issues were then pending before a federal court.

be enhanced substantially if they were accorded the opportunity to submit their comments in response to any submissions that NYS&W, the operators of the 16th Street facility, or other operators railroads or solid waste facilities may make, rather than submit comments in response to the issues raised by the petitioners. As NJDEP and NJMC are governmental parties, their interests are distinct and separate from those either of the petitioners or the likely railroad or solid waste operator commenters and it would be appropriate under these circumstances for governmental parties to be given the opportunity to review the comments of other parties before supplying their own views to the Board.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Ed Greenberg', written over a horizontal line.

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Dated: November 16, 2005

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 16th day of November, 2005 served copies of the foregoing Reply upon the following persons by first class mail, postage pre-paid:

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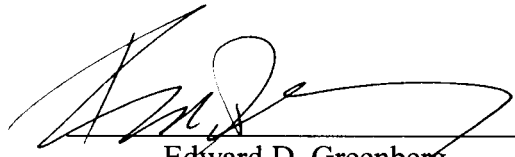
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